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In the Supreme Court of the United States

October Term 1971

No. 71-1271

DON SCHNEIDER, SP-4, United States Army,
Petitioner,

vs.

MELVIN R. LAIRD, Secretary of Defense, The Pentagon, Washington, D.C.;
STANLEY R. RESOR, Secretary of the Army, The Pentagon, Washington, D.C.;
COLONEL MAX ETKIN, Commanding Officer, Deseret Test Center, Salt Lake City, Utah;
COLONEL CHARLES M. SHADLE, Commanding Officer, Dugway Proving Ground, Dugway, Utah,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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In the Supreme Court of the United States

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No. .....

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Don Schneider requests that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled case on January 6, 1972.

OPINIONS BELOW

The per curiam opinion of the Court of Appeals for the Tenth Circuit dated January 6, 1972, is not yet reported and is printed in the Appendix to this petition at page A-1. The memorandum decision of the United States District Court for the District of Utah, affirmed by the Court of Appeals, is unreported and is printed in the Appendix to this petition at page B-1.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on January 6, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

(1) Whether the standards and procedures established by Army regulations and applied by petitioner's commanding officer and the Department of the Army in refusing permission for on-post distribution of a newspaper prepared by petitioner unconstitutionally restrained petitioner's freedom of expression and freedom from prior restraint under the First Amendment?

(2) Whether the refusal by petitioner's commanding officer to provide petitioner any opportunity for hearing with respect to factual matters asserted as grounds for refusing permission for on-post distribution of a newspaper prepared by petitioner denied petitioner due process of law as guaranteed by the Fifth Amendment?

(3) Whether the standards and procedures applied by petitioner's commanding officer and the Department of the Army in refusing permission for on-post distribution of a newspaper prepared by petitioner failed to comply with the standards and procedures required by applicable regulations?

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

(1) First Amendment, Constitution of the United States:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

(2) Fifth Amendment, Constitution of the United States:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

(3) Army Regulation 210-10, paragraph 5-5 (as revised by change 1 dated 10 March 1969), is set forth at page C-1 of the Appendix to this Petition. Army Regulation 210-10 is a general Army regulation which "outlines the duties and prescribes the general authority and general responsibility of an installation commander" and is "applicable to installations in the United States and, where-appropriate, to overseas installations." (Paragraphs 1-1 and 1-2, Army Regulation 210-10.) Paragraph 5-5 of that regulation, entitled "Protection of loyalty, discipline and morale" authorizes and establishes standards for a commander's control of distribution of publications on his installation.

(4) Department of Defense Directive Number 1325.6 (September 12, 1969) is set forth in its entirety at page D-1 of the Appendix to this Petition. Its subject is "Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces."

(5) Memorandum on the subject "Guidance on Dissent" by the Office of the Adjutant General, Department of the Army, dated 28 May, 1969, for distribution to all army commands is set forth in its entirety at page E-1 of the Appendix to this Petition.

STATEMENT OF THE CASE

In the Spring of 1970, petitioner, then a Specialist 4th Class, United States Army, prepared and published in compliance with applicable army regulations a newspaper of fact and opinion about army life and current politics titled the "Deseret Daisy." (The "Daisy.") Acting under Army Regulation 210-10, paragraph 5-5 (Appendix C, pages C-1 to C-3), petitioner's commanding officer, on insufficient grounds and without hearing, issued a written order that petitioner refrain from distributing the Daisy on post until review by the Department of the Army was completed. Despite several written requests for hearing, for clarifying guidelines, and for opportunity to make submissions on Departmental review, no opportunity to participate in any manner was ever proferred to petitioner.

After administrative review by the Department of the Army had consumed more than three months in spite of timely requests for expedition, this action was commenced on 10 September 1970 for mandatory and de-

claratory relief from the system of prior restraint established by the applicable regulations and from the orders refusing to permit distribution of specific issues of The Daisy. Jurisdiction was based on 28 U.S.C. § 1361 and 5 U.S.C. §§ 701-706. Just prior to hearing on a motion for preliminary relief, the Department of the Army reversed the commanding officer's determinations respecting the first two issues of the Daisy, but made no effort to clarify the standards applied or to ameliorate the system of prior restraints. When distribution of a subsequent issue was refused and similarly delayed on administrative review, petitioner brought on a motion for preliminary relief and for accelerated hearing on the merits. Three days prior to hearing, nearly two months after request to the commanding officer, petitioner was advised that the Department had affirmed the commanding officer, and was then first advised of the grounds for his determination, which included many disputable questions of fact. The District Court for the District of Utah heard the case on the merits, denied all relief and dismissed the complaint; and that action was affirmed *per curiam* by the United States Court of Appeals for the Tenth Circuit.

The incidents giving rise to this action began on 19 May, 1970, when petitioner first submitted a proper written request to his Commanding Officer at Dugway Proving Ground, Utah, requesting an appointment "for the purpose of obtaining his approval for the distribution of a new publication at Dugway Proving Ground" and offering for examination the first issue of the Daisy. On 10 June, 1970, petitioner again submitted a proper written request for "an appointment" with his Commanding Officer "concerning the distribution of the

'Daisy' on post through authorized channels." Similar written requests, including requests for hearing, for clarification of applicable standards and for opportunity to make submissions on any departmental review, were submitted on 11 and 16 June 1970.

On 25 May 1970, petitioner received a written order forbidding distribution of the first issue of the Daisy "until a final decision is received from the Department of the Army," based on a command determination that the Daisy "presents a clear danger to the discipline of the members of this command." The commanding officer grounded that determination on an editorial which had stated that:

> This paper has been fighting for its life and is waging a winning battle thanks to the overwhelming support of the enlisted men and a few of the more enlightened officers on post.

The determination was also based on a finding that the Daisy "contains language which is considered obscene and offensive to women and children and which affects the discipline of our troops," quoting the following from the first issue:

> I have heard from many of my fellow men that trying to solve a personal problem by following the army chain of command was almost as sensible as attempting to urinate up cross-braided hemp.

On 17 June 1970 petitioner received a similar written order refusing permission for on-post distribution of the second issue of the Daisy. The basis for that determination, as set forth in the order, was the use of the word "broads" in the second issue, referring to female

attendants at the post-exchange service station. The Commanding Officer reasoned that the word "broad" was "highly offensive" and "in bad taste" because its dictionary definition includes "a prostitute." Because the female service station attendants were wives of men under his command, the commanding officer found that "your inflammatory and disrespectful language clearly presents a danger to the discipline and morale of the members of this command, in that it offends and provokes the stated ladies and their aggrieved husbands."

In spite of a letter dated 1 July 1970, from petitioned's counsel to the reviewing authorities in the Department of the Army asserting petitioner's first Amendment rights and requesting prompt action in view of an impending discharge date, no response was received from reviewing authorities until shortly before the time set for hearing on petitioner's motion for preliminary injunction, on 28 September 1970. Petitioner was then informed that the Department of the Army had reversed the commanding officer's determinations with respect to the first two issues of the Deseret Daisy; and that reversal was confirmed by an order of the Department of the Army, a copy of which was provided to petitioner's counsel on 6 October 1970. The order of the Department of the Army determined that the language of the Daisy "does not appear to meet the test" of Army Regulation 210-10, paragraph 5-5, but offered no clarification of the standards or procedures to be applied.

On 16 October 1970, petitioner submitted a written request for permission to distribute the fourth issue of the Daisy. The Executive Officer, Dugway Proving Ground, responded in writing on 21 October 1970 that

the "proposed method of distribution is not clear" because petitioner had requested permission to distribute "through authorized channels." He found the words "authorized channels" to be ambiguous, despite the fact that previous requests had used similar phraseology and the fact that the Commanding Officer, on 6 October 1970, had advised petitioner of the manner of distribution that would be permitted in compliance with the reversal of his prior order by the Department of the Army.

On 3 November 1970, the Commanding Officer, without opportunity for hearing or other proceedings, advised petitioner in writing that his request to distribute the fourth issue of the Daisy had been forwarded to the Department of the Army, and that he was prohibited from making any distribution "pending receipt of a decision" from the Department. No explanation or statement of reasons for that action was supplied to petitioner at that time.

On 11 December 1970, three days before the date set for hearing on petitioner's renewed motion for preliminary injunction and accelerated hearing on the merits, petitioner's counsel was supplied with a written determination by the commanding officer that the fourth issue of the Daisy "presents a clear danger to the loyalty, discipline and morale of the troops," together with a written statement of reasons for that determination. Counsel was also then informed that the Department of the Army had affirmed the Commanding Officer's determination.

The reasons recited by the Commanding Officer for refusing distribution of the fourth issue of the Daisy related largely to some examples of "bad taste" which the

Commanding Officer found objectionable and a generalized fear that some statements would promote disloyalty or disrespect of officers and undermine discipline, or would interfere with harmonious relations between Army personnel and civilians assigned to Dugway Proving Ground. No specific incidents or problems arising from the Daisy or similar publications were asserted, and most of the Commanding Officer's stated objections depended heavily on his conclusions that specific statements in the fourth issue were false—conclusions subject to challenge if petitioner had been accorded some means of contesting the facts and the reasons for the order.

On 14 December 1970, a hearing was held on petitioner's motions for preliminary injunction and for accelerated hearing on the merits of his claims for mandamus and for declaratory relief. Petitioner had been released from active duty on 5 December 1970; but an associate in the preparation of the Deseret Daisy, Pfc. Randall Gibbs, testified that he had agreed with petitioner to distribute the fourth and subsequent issues if permission were obtained.

At the hearing, the Commanding Officer reasserted his previously-stated objections to distribution of the Daisy. Except for conclusory assertions that he applied the standards set forth in Army Regulation 210-10, he presented no evidence of the slightest danger or threat to the loyalty, discipline or morale of the men under his command. All of the commanding officer's objections were based upon his disagreement with facts asserted in specific articles in the fourth issue or his generalized fear that certain gibes directed at the President, officers,

noncommissioned officers or civilians employed on post would cause disloyalty or disrespect and might disrupt discipline. His testimony was heavily infected with his personal reaction to the material in the Daisy, which he characterized as "garbage."

On 29 March 1971, in a memorandum decision, the United States District Court for the District of Utah denied petitioner's prayer for preliminary injunction, declaratory relief and mandamus, and dismissed petitioner's complaint. (Appendix, pages B-1 through B-11) The United States Court of Appeals for the Tenth Circuit, on motion for summary affirmance, affirmed the District Court with a per curiam opinion on January 6, 1972. (Appendix, pages A-1 through A-5)

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals for the Tenth Circuit intensifies the existing conflict among the Courts of Appeals respecting the extent of protection afforded free expression on military reservations and the appropriate scope of judicial review of military regulations and orders restricting free expression.

The present case provides an appropriately narrow basis for resolving many of the conflicting holdings and implications in the growing number of Courts of Appeals' decisions relating to the exercise of First Amendment rights on military posts. *Compare United States v. Flower*, 452 F.2d 80 (5th Cir. 1971) and *Dash v. Commanding General*, 429 F.2d 427 (4th Cir. 1970), *aff'g per curiam* 307 F. Supp. 849 (D. S.C. 1969), *cert.*

denied, 401 U.S. 981 (1971) *with Kiiskila v. Nichols*, 433 F.2d 745 (7th Cir. 1970) and *United States v. Bradley*, 418 F.2d 688 (4th Cir. 1969). *See also Yahr v. Resor*, 431 F.2d 690 (4th Cir. 1970), *cert. denied*, 401 U.S. 982 (1971); *Cortright v. Resor*, 447 F.2d 245 (2d Cir. 1971) *petition for cert. filed*, 40 U.S.L.W. 3317; and *Overseas Media Corp. v. McNamara*, 385 F.2d 308 (D.C. Cir. 1967).

The opinion of the Court of Appeals for the Tenth Circuit in the instant case is only the most extreme among a number of Circuit opinions which, in deference to a generalized command discretion, have applied a narrower and less intensive scope of review of military restrictions on free expression than is ordinarily applicable in First Amendment cases. Applying a "clearly erroneous" standard of review, the Tenth Circuit simply accepted the District Court's finding "as a fact" that the order prohibiting distribution of the Daisy was "reasonably" based upon its "perceived detrimental effect on the troop discipline, loyalty and morale." (App. p. A-4.) Similiarly, in rejecting petitioner's challenge to the vagueness and overbreadth of Army Regulation 210-10 and to the system of prior restraints imposed under it, the Tenth Circuit merely deferred to "the recognized peculiarities of the military community," "the established need of the commander to preserve his control" and "the context of the military environment." (App. p. A-3.) There was no apparent attempt at close analysis of the overbreadth and vagueness of the regulations or the speculative grounds offered by the commanding officer in support of his generalized fear that some material in the Daisy might undermine the "loyalty,

discipline and morale" of his troops. Nor was any thought given to confining the extreme prior restraints permitted by the regulation and reflected by the record in this case, despite the substantial foundation for such a ruling based upon petitioner's early written request to his Commanding Officer "to discuss the paper . . . and request under what terms and conditions distribution of the Daisy on post would be allowed."

In adopting the limited scope of review applied in the instant case, the Tenth Circuit relied upon *Dash v. Commanding General*, 307 F. Supp. 849 (D. S.C. 1969), *aff'd per curiam*, 429 F.2d 427 (4th Cir. 1970), and *United States v. Flower*, 452 F.2d 80 (5th Cir. 1971), both of which also emphasized the "wide discretion" of a military commander in restraining expression. 307 F. Supp. at 853; 452 F.2d at 85. Although not emphasized by the opinions in this case, similar views of the broad discretion of military commanders to restrain free expression, and the accompanying narrow scope of judicial review, are reflected in the decisions of the United States Court of Military Appeals. *United States v. Amick*, 40 C.M.R. 720 (Army Board of Review 1969), review denied, 18 U.S.C.M.A. 643 (1969); *United States v. Daniel*, 19 U.S.C.M.A. 529, 42 C.M.R. 131 (1970); *United States v. Harvey*, 19 U.S.C.M.A. 539, 42 C.M.R. 141 (1970); *United States v. Gray*, 20 U.S.C.M.A. 63, 42 C.M.R. 255 (1970). See Sherman, The Military Courts and Servicemen's First Amendment Rights, 22 Hastings L.J. 325 (1971); Comment, "Military Discipline and Political Expression: A New Look At An Old Bugbear," 6 Harv. Civ. Rights - Civ. Lib. L. Rev. 525 (1971); Kester, "Soldiers Who In-

sult The President: An Uneasy Look at Article 88 Of The Uniform Code of Military Justice," 81 Harv. L. Rev. 1697 (1968).

In contrast, the Court of Appeals for the Seventh Circuit, in *Kiiskila v. Nichols*, 433 F.2d 745 (7th Cir, 1970) demonstrated much less deference to command judgment and applied the more rigorous standard of review applicable in other First Amendment contexts. In reversing a summary judgment dismissing plaintiff's claims challenging her exclusion from Fort Sheridan, which had resulted from the Command's discovery of anti-war literature in her car on post, the Seventh Circuit rejected "a broad claim that undefined military and national defense coinsiderations are sufficient to permit the government to infringe plaintiff's rights to freedom of speech and association." 433 F.2d at 750. Examining the grounds offered in support of the exclusion order, the Court concluded that there was no evidence "that military discipline is actually affected by plaintiff's presence on the base or even by her antiwar activities." *Id.*

In analyzing the adequacy of the evidence of danger to military interests, the Seventh Circuit in *Kiiskila* departed from the "rational basis" review reflected in the above cases and applied the more stringent doctrine that purported justifications for invading First Amendment rights must be subjected to rigorous and independent judicial examination in order to avoid restraints based on "undifferentiated fear." *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 508-09 (1969).

Similar rigorous examination of evidence supporting a military restraint on expression is suggested in *Yahr v. Resor*, 431 F.2d 690 (4th Cir. 1970), where the Court emphasized, on remand, that the District Court should develop a complete record to determine "whether the Commanding General had a proper basis" for denying permission, under Army Regulation 210-10, for distribution of a newspaper published by servicemen. And in *United States v. Bradley*, 418 F.2d 688 (1969), the Fourth Circuit narrowly construed local post regulations in order to avoid First Amendment questions in reversing convictions for entering Fort Bragg without permission for the purpose of handbilling.

The latter cases clearly reflect a standard for judicial review of First Amendment matters more consonant with established constitutional doctrine. But the developing case law reflected by the instant case, *Dash v. Commanding General*, *supra*, and *United States v. Flower*, *supra*, demonstrates a trend toward much less rigorous examination of purported grounds for restraint of free expression by military authorities.

This Court should grant review in the instant case in order to harmonize these conflicting approaches to the fundamental right of free expression.

2. The decision of the Court of Appeals for the Tenth Circuit is in direct conflict with controlling decisions of this Court with respect to the application of First Amendment standards, the imposition of prior restraints and denial of right to hearing.

As argued in the preceding section of this petition, the limited "rational basis" scope of judicial review applied in the Tenth Circuit in reviewing the Commanding Officer's refusal to permit distribution of the Daisy seriously conflicts with First Amendment standards well established in this Court. Not only did the Tenth Circuit fail to provide the intensive review of evidence supporting restraints on expression required by *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) and *Gregory v. City of Chicago*, 394 U.S. 111 (1969); but it also totally failed to analyze the serious overbreadth and lack of adequate standards of Army Regulation 210-10, paragraph 5-5, on which the Commanding Officer relied. Yet in cases brought to the attention of the Tenth Circuit, this Court recently emphasized that restraints based upon apprehensions about "loyalty" implicate difficult questions of personal philosophy and political commitment which are beyond the competence of even the Congress or the President. *United States v. Robel*, 389 U.S. 198 (1967); *Schneider v. Smith*, 390 U.S. 17 (1968).

While there is the suggestion in *Dash v. Commanding General*, 307 F. Supp. 849 (D. S.C. 1969) that the overbreadth of that regulation can be narrowed by incorporating the standards elaborated in the Adjutant

General's memorandum of 28 May 1969, entitled "Guidance on Dissent" (App. pp. E-1 through E-9), 307 F. Supp. at 855, the Tenth Circuit made no effort to apply those standards or to require adequate findings. Similarly, no attempt was made to apply Army Regulation 210-10 in light of the standards and requirements of Department of Defense Directive No. 1325.6 of September 12, 1969 ("Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces," App. pp. D-1 through D-5.).

In *Blount v. Rizza*, 400 U.S. 410 (1971), this Court recently reemphasized the heavy burden borne by prior restraints under the doctrine of *Freedman v. State of Maryland*, 380 U.S. 51 (1968), requiring that systems of administrative censorship be held invalid unless they are administered with "sensitive tools" including the following: (1) the government must bear the burden of initiating judicial review; (2) the government must bear the burden of proving that the material is unprotected expression; (3) judicial review must assure "a final judicial determination of the merits within a specfied brief period"; and (4) any restraint imposed in advance of a final judicial determination must be limited "to preservation of the status quo for the shortest, fixed period compatible with sound judicial resolution." 400 U.S. at 417. The record in the instant case demonstrates not only a failure to satisfy any of those requirements but an interminable administrative review process which effectively silenced the petitioner's newspaper. Yet the Tenth Circuit dismissed the prior restraint claim with a generalized reference to the special circumstances of the military. (App. p. A-3.)

Finally, the Tenth Circuit disposed of petitioner's due process claims without explanation, presumably on the basis of the generalized reference to *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961), without any apparent recognition that the current decisions of this Court have emphasized that procedural due process requires some form of evidentiary process where official action is based on disputed facts. *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969). Yet, in the instant case, the Commanding Officer's determination refusing to permit distribution of the fourth issue of the Daisy was based on numerous disputable factual assertions which petitioner could have contested if his requests for hearing had been heeded and adequate notice of the grounds for the Commanding Officer's action had been supplied.

CONCLUSION

For the foregoing reasons the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals Tenth Circuit

NOVEMBER TERM, 1971

No. 71-1324

DON SCHNEIDER, SP-4, United States Army,
Plaintiff-Appellant.

vs.

MELVIN A. LAIRD, Secretary of Defense, The Pentagon, Washington, D.C., STANLEY R. RESOR, Secretary of the Army, The Pentagon, Washington D.C., COLONEL MAX ETKIN, Commanding Officer, Deseret Test Center, Salt Lake City, Utah, COLONEL CHARLES M. SHADLE, Commanding Officer, Dugway Proving Ground, Dugway, Utah.
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
(D. C. C-236-70)

C. Nelson Day, United States Attorney, and H. Ralph Klemm, Assistant United States Attorney, have filed a motion to affirm and memorandum in support of the motion on behalf of appellees.

William J. Lockhart has filed memorandum in opposition to summary action on behalf of appellant.

Before LEWIS, Chief Judge, and PICKETT and McWILLIAMS, Circuit Judges

PER CURIAM

A United States Army Regulation, AR 210-10, delegates to the commanding officer of a military post authority to preclude the on-base distribution of certain publications. Upon his determination that the dissemmination of a publication within the area of his command "presents a clear danger to the loyalty, discipline, or morale of troops," the commander is empowered to restrain distribution. Supplements to this regulation, Department of Defense Directive, No. 1325.6 and the Adjutant General's "Guidance on Dissent," indicate that the commanding officer is not to allow personal preferences or tastes to dictate his decision. When the Commanding Officer of Dugway Proving Ground, Utah, was confronted with Schneider's timely requests for permission to distribute on base certain issues of an "underground newspaper," the Daisy, he denied the requests pursuant to AR 210-10. The Department of the Army overruled his decision as to issues numbered one and two, but upheld the decision to exclude the issue numbered four from the military installation.

Schneider, a serviceman assigned to Dugway at the time, who prepared and printed the Daisy during his off-duty hours, sought injunctive and other relief claiming that both the regulation and the military's action thereunder violated constitutional principles. It is urged that, at minimum, he was entitled to a hearing prior to the denial of his requests. Having concluded that the case had not been rendered moot by Schneider's subsequent release from active duty, as another active serviceman

stands prepared to continue identical activities involving the Daisy, and having found that jurisdiction existed to review the matter, nevertheless, the district court resolved the above claims adversely to Schneider upon its consideration of oral testimony adduced at an evidentiary hearing together with the stipulation of facts before it and extensive briefs filed in the case.

We agree with the district court's conclusion that the challenged regulation is without constitutional defects. Especially persuasive in this regard is the reasoning underlying the Fourth Circuit's approval of a similar restriction. Dash v. Commanding General, 307 F. Supp. 849 (D. South Carolina, 1969), aff'd 429 F.2d 427 (4th Cir. 1970), cert. denied 401 U.S. 981 (1971). See also, Yahr v. Resor, 431 F.2d 690 (4th Cir. 1970), cert. denied 401 U.S. 982 (1971). Schneider's challenge, premised upon the argument that the regulation incorporates procedures amounting to an impermissible prior restraint and that the regulation suffers from vagueness and overbreadth, ignores the recognized peculiarities of the military community, negates the established need of the commander to preserve his control, and disregards the ascertainable standard or guideline superimposed on the regulation in the context of the military environment. See Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961); Weissman v. United States, 387 F.2d 271 (10th Cir. 1967); and United States v. Jelinski, 411 F.2d 476 (5th Cir. 1969), cert. denied 396 U.S. 943 (1969). In this light, the purposes for which a military base is designed has also led the Fifth Circuit to uphold a military base regulation similarly limiting on-base distribution of publications. United States v. Flower, 40 L.W. 2287 (5th Cir., November 8, 1971).

Nor are we able to discover any merit in Schnieder's contention that the commanding officer's and the military's application of the regulation exceeded constitutional bounds. The unique posture and ability of a commanding officer to comprehend internal threats to his command or to the loyalty and morale of his troops must augur against Schneider's position that the military's failure to hold a hearing before final determination deprived him of due process. See, for example, Cafeteria & Restaurant Workers Union v. McElroy, supra, at 895, and Weissman v. United States, supra.

The commanding officer fully stated the reasons for refusing permission to distribute. The district court found as a fact that the commander acted reasonably and in accordance with AR 210-10. The record shows that the commanding officer included specific references to passages of ridicule amplified by explanations of the perceived detrimental effect on the troop discipline, loyalty, and morale. The district court expressly found that the procedures utilized were not ineffective and that the Daisy was not accorded discriminatory treatment. As reflected by the record, claims of delay on the part of the military appear to be attributable partly to Schneider and claims of discrimination lack support. The district court's findings, therefore, will not be disturbed on appeal for they are supported by the record and cannot be termed clearly erroneous. Roy v. Mid-Continent Casualty Company, 438 F.2d 338 (10th Cir. 1971); First National Bank of Cushing, Oklahoma v. Security Mutual Casualty Company, 431 F.2d 1025 (10th Cir. 1970), cert. denied 401 U.S. 975 (1971); Butler Paper Company v. Business Forms, Ltd., 424 F.2d 247 (10th Cir.

1970); and Glens Falls Insurance Company v. Newton Lumber & Mfg. Co., 388 F.2d 66 (10th Cir. 1967), cert. denied 390 U.S. 905 (1968).

We informed Schneider that the court was contemplating summary affirmance and that appellees had filed a motion to affirm. Memoranda addressing the merits and opposing summary action have since been submitted. After thoroughly reviewing the files and the record of the case, however, we are convinced that the judgment of the district court is correct and that oral argument and further briefing are not necessary.

Accordingly, the motion to affirm is granted and the judgment is affirmed.

APPENDIX B

In the United States District Court For the District of Utah

CENTRAL DIVISION

No. C 236-70

DON SCHNEIDER, SP-4, United States Army,
Plaintiff,

MELVIN R. LAIRD, Secretary of Defense, The Pentagon, Washington, D.C.;
STANLEY R. RESOR, Secretary of the Army, The Pentagon, Washington, D.C.;
COLONEL MAX ETKIN, Commanding Officer, Deseret Test Center, Salt Lake City, Utah;
COLONEL CHARLES M. SHADLE, Commanding Officer, Dugway Proving Ground, Dugway, Utah,
Defendants.

MEMORANDUM DECISION

The issues in this case have been submitted for decision of the court upon a stipulation of facts supplemented by an evidentiary hearing and upon oral arguments and briefs. The court now considers itself fully advised in the premises and concludes upon the record and in view of the controlling principles of law that the plaintiff has no cause of action, that injunctive relief should be refused, and that his complaint, as amended, should be dismissed.

The stipulation of facts on file herein adequately indicates the nature of the case, the structure of circum-

stances out of which it has arisen, and most of the controlling facts which, in view of the law, dictate the result. They are incorporated herein by reference. Supplemental findings based on the evidence or upon reasonable inferences from the stipulated facts and the evidence received in open court are indicated hereafter.

The court concludes that there may be some question concerning jurisdiction as claimed by the government. More serious than the problem of sovereign immunity is the amount in controversy, since it is doubtful that there is sufficient evidence from which it reasonably can be found that the amount in controversy exceeds $10,000 exclusive of interest and costs. *See* Goldsmith v. Sutherland, 426 F.2d 1395 (6th Cir. 1970). But I am persuaded in view of cases which reach the merits without a much better showing of amount that jurisdiction in a broad sense does exist to judicially inquire into the constitutional validity of the limitation on distribution of the publication in question and procedures in connection therewith. Of more practical concern are the limitations upon the authority of the court to interfere with the internal administration of military posts and the exercise of the discretion vested in military commanders and the Department of the Army by Acts of Congress.

Nor do I think the routine and honorable discharge of the plaintiff from the United States Army on December 4, 1970, has rendered this case moot with respect to issue number 4 of The Daisy. Pfc. Randall Gibbs, presently stationed at Dugway Proving Ground under the command of Colonel Shadle, although not a party herein, had worked with plaintiff in preparing for publication both issue number 4 of The Daisy as well as earlier

issues and had told plaintiff that if and when permission were granted for distribution of issue number 4 he would make the necessary arrangements to facilitate the permitted distribution. Gibbs has further indicated a willingness to participate in the preparation and distribution of further issues.

While Army Regulation 210-10, as revised March 10, 1969, contains the controlling regulations applicable to the distribution of plaintiff's newspaper, The Daisy, Department of Defense directive number 1325.6 of September 12, 1969, and a memorandum entitled "A Guidance on Dissent" issued by the Office of the Adjutant General, Department of the Army, on May 28, 1969, constitute other pertinent directives which had influence upon the command's interpretation of Army Regulation 210-10. Said Army Regulation 210-10, considered separately or in connection with the subsequent directives mentioned, is not unreasonable, capricious or arbitrary, is not unreasonably vague or indefinite, is not unconstitutional on its face or otherwise, and constitutes a reasonable and appropriate regulation within the jurisdiction and authority of the Department of the Army.

The commanding officer set forth his reasons for denying distribution of issue number 4 of The Daisy in a joint message form to the Army Chief of Information, dated November 13, 1970, but these reasons were first made available to plaintiff on December 11, 1970, when a copy of the joint message form was provided to plaintiff's counsel.

Colonel Charles M. Shadle, Commanding Officer of Dugway Proving Ground, in denying distribution of issue number 4 of The Daisy, stated that he had in good

faith applied the standards of Army Regulation 210-10, and the court so finds. While he indicated a personal feeling that material in The Daisy was "objectionable" or "offensive" or unfair in its criticism of non-commissioned and commissioned officers and of civilian employees at Dugway Proving Ground, it is apparent to the court that this feeling was based upon a conviction for cause that the material was detrimental to his command in that it presented a clear danger to the loyalty, discipline and morale of the military personnel stationed there and to the overall functioning and performance of the command. The court recognizes that any such determination of necessity must be subjective to a degree but that when such material is clearly detrimental to the command as found by the Commanding Officer, the fact that it is also of such a nature as to elicit feelings or expressions of personal objection or resentment does not make the material any less subject to the regulation; otherwise, only mild or innocuous material transcending the regulation, if this could be supposed, rather than the extreme material encompassed in issue number 4, could be limited in distribution.

The court has carefully examined the contents of issue number 4 of The Daisy and believes that the Commander's findings and conclusions with reference thereto were neither arbitrary, capricious nor immoderate. Counsel's inferential argument that the Commander should have disregarded this issue as merely a kind of attempted humor, however crude, in the court's opinion ignores the dominant characteristic that in separate articles or items, as well as in its overall aspect, it seems intended and designed primarily to hold the Army and its mission up to ridicule, derision or disgust, to set enlisted men against

officers, military personnel against civilians, and to provoke general discord and disharmony.

No matter how far the claim to freedom of speech should be extended in other contexts, it is the court's judgment that neither in law nor reason can such a publication be entitled to distribution on a military post in the face of the reasonable findings and order of that command, much less under its demanded aegis and blessing. To allow this, in principle, would compromise the constitutional right of the executive to reasonably provide for the common defense, would permit all manner of similar interferences with the legitimate mission of military establishments and by such abuse under the guise of freedom of speech might tend to erode or to throw into question this vital right in its far-reaching appropriate applications. The enforced abuse of a right rarely tends to strengthen or vindicate such a right.

Neither projected issues 5 and 6 nor any other future issues are before me, and under the rationale of this decision their contents would determine the propriety of restrictions upon their distribution. I shall not speculate on such possible contents, nor shall I assume to render a declaratory judgment with reference to issues 1 and 2 which, despite the initial disapproval of their distribution by the Commander, after review, were permitted to be distributed. Such review, although delayed, and to some extent for reasons to which plaintiff contributed, does indicate that the established processes of review were not ineffective. In any event, if the case is not moot with respect to issues 1 and 2, I find no constitutional infirmity in the processes which eventually led to their acceptance for distribution or in the interim action which

precluded for a time their distribution in accordance with the initial judgment of the Commanding Officer.

I reject the argument of the plaintiff presented in a supplemental memorandum that the decision announced by the Supreme Court in Blount v. Rizzi, ... U.S. ....., 39 U.S.L.W. 4120 (Jan. 14, 1971), is controlling in the context of the present case. Counsel for plaintiff says that this case is central to plaintiff's argument that present Army regulations fail to assure the judicial review required where prior restraints are imposed upon free expression. To equate the situation in *Blount* where the right to speak was indicated as almost as unlimited as the right to use one's own tongue (quoting Mr. Justice Holmes) with a situation in the military command would be unrealistic. As the Supreme Court pointed out in Burns v. Wilson, 346 U.S. 137, 140 (1952):

> "[T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress."

The distinction stressed in Noyd v. McNamara, 378 F.2d 538 (10th Cir. 1967), similarly must be recognized:

> "Military regulations must be considered in the light of military exigencies, 'must be geared to meet the imperative needs of mobilization and national vigilance—when there is no time for "litiguous interruption" '. [Quoting from United States v. Nugent, 346 U.S. 1, 10 (1953)] and great and wide discretion exists in the executive department both in the formation and application of regulations and in their interpretation in such

matters as what constitutes 'for the good of the service' ".

A precise or extended analysis of the many authorities cited in the briefs does not seem justified here. Suffice it to say that, after reviewing the briefs and the authorities cited, I agree with the government in the context of this case that the procedural orders of the Dugway Commanding Officer relating to distribution of plaintiff's newspaper, while in my opinion they are not exempt from judicial inquiry, do pass constitutional muster; that the prior restraint doctrine applied by the Supreme Court in other contexts, particularly as to obscene material in the mails or in the general community, is not applicable as a rigid test in cases such as this; that under the circumstances of the present case the prior restraint was and is constitutional; and that specifically the decision to bar issue number 4 of The Daisy was reasonable and violated no constitutional right of the plaintiff notwithstanding there was no judicial determination of the right to preclude distribution prior to the refusal of permission.

I find no merit in the contention that there was unlawful discrimination against plaintiff because of separate consideration being given to distributions on the Post through regularly established channels and distribution through other than regularly established channels. The argument that "Playboy Magazine" and other national publications were distributed through regularly established channels without prohibition, in my judgment, raises no question of the validity of the order with respect to issue number 4 of The Daisy. There was no showing that any issue of any national magazine con-

tained either the type of material or its concentration as was found in The Daisy, nor that the impersonalized impact of any such material would be the same as that of material prepared by military personnel in, and directed particularly to and against, the command involved here.

We think that a commander has considerable discretion in the case of the distribution of publications creating a clear danger to the mission of the military establishment in a pervasive and continuing way just as in the case of the exclusion of a person from the base. In the latter connection the Court of Appeals stated among other things in Weissman v. United States, 387 F.2d 271, 273-74 (10th Cir. 1967):

> "The bar order is attacked on the ground that the government showed no valid reason for its promulgation. The argument is that Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230, requires that the reason for exclusion must be spelled out in detail. We do not read the Cafeteria Workers decision as requiring that detailed reasons are necessary to sustain a bar order. It holds that although the person challenging the order 'could not have been kept out because she was a Democrat or a Methodist . . .,' she could be excluded on the showing that 'the reason advanced for her exclusion was . . . entirely rational . . .' and the order was within the authority of the issuing officer.
>
> ". . . .
>
> "General Brown, the commanding officer, ordered his staff to investigate the defendants' activities at Fort Sill. The staff intelligence officer prepared a report which went up the chain of command to the General. On the basis of the report the General made the bar order. He testified that he did so because he considered the conduct

> of the defendants 'prejudicial to good order and discipline, and the accomplishment of my mission.' In the facts presented the basis for the order appears more clearly than did the basis for the order in the Cafeteria Workers case. We believe that the order was reasonable. Even if we did not so believe, the order was within the discretionary power of the commandant and not reviewable by the courts."

In Dash v. Commanding General, 429 F.2d 427 (4th Cir. 1970), *cert. denied*, 39 U.S.L.W. 3410 (March 23, 1971), soldiers stationed at Ft. Jackson, South Carolina, had appealed from a judgment of the district court which had upheld the constitutionality of a regulation prohibiting the distribution of printed material without the post commander's approval and had sustained the commander's denial of their request for a public meeting on the post. The lower court's opinion, Dash v. Commanding General, 307 F. Supp. 849 (D. S.Car. 1969), was affirmed by the Court of Appeals in a memorandum decision, approving Judge Russell's reasoning. That reasoning also is applicable to sustain the government's position in the instant case on the validity of the commander's preclusion order. Incidentally, Judge Russell's opinion also is persuasive in this court's opinion that the present case should neither be considered moot nor as one which should not be considered for lack of jurisdiction. But compare Harper v. Jones, 195 F.2d 705 (10th Cir. 1952).

In Yahr v. Resor, 431 F.2d 690 (4th Cir. 1970), *cert. denied*, 39 U.S.L.W. 3410 (March 23, 1971), it was held that the refusal to grant a preliminary injunction prohibiting the Commanding General of a military post from interfering with distribution of a newspaper

on the post under a regulation authorizing the commanders to restrict dissemination of publications constituting clear danger to military loyalty, discipline or morale did not constitute an abuse of discretion. Among other things the court made the following comment:

> "Within the military establishment, and under the regulations in question, the commanding officer has primary responsibility for determining the impact of the newspaper on the men in his command."

431 F.2d at 691.

The plaintiff relies upon Goldberg v. Kelley, 397 U.S. 254 (1970), for the claim that no matter what the merits of the commander's order might be, it could not be effective without providing an advance hearing and opportunity for argument and presentation of evidence. The holding in *Goldberg* that welfare benefits are a matter of statutory entitlement for persons qualified to receive them and procedural due process is applicable to their termination does not seem to be in point here. More pertinent is Yates v. Jelinski, 411 F.2d 476, 477 (5th Cir. 1969):

> "Passing over the rather serious question of whether this issue is properly assertable in this preceeding, the Base Commander was not required to afford notice and a hearing to appellant prior to barring him [the civilian son of a serviceman] from the base."

And in Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961), it was determined that summary action my be taken within the authority entrusted to the military without offending constitutional due process requirements.

This memorandum being deemed sufficient under Rule 52, Federal Rules of Civil Procedure, to indicate the basis of my ruling and as findings of fact and conclusions of law, the prayer of the complaint, as amended, is denied, an injunction is refused and plaintiff's complaint, as amended, is hereby dismissed.

Dated this 29th day of March, 1971.

A. Sherman Christensen
United States District Judge

APPENDIX C

Army Regulation 210-10

★5-5. Protection of loyalty, discipline and morale.

a. Objectives. The maintenance of loyalty, discipline, and morale among Army troops is essential if the Army is to continue to provide a reliable and effective military force responsive to the national security missions assigned pursuant to lawful authority. At the same time, troops are generally entitled to the free access to news and publications which other citizens enjoy.

b. Responsibilities. Installation commanders will encourage and promote the availability to service personnel of books, periodicals, and other amusement media which present a wide range of viewpoints on public issues. Such media should include those emphasizing the standards of loyalty, patriotism, and discipline which are common to the armed force. However, installation commanders will not, except as provided in this paragraph, take action to control or restrict the dissemination of publications, even if such publications are believed to be in poor taste or unfairly critical of Government policies or officials. The installation commander will be guided by the principle that, except in cases in which a publication constitutes a clear danger to military loyalty, discipline, or morale, military personnel are entitled to the same free access to publications as are other citizens.

c. Restrictions on disseminations of publications. If it appears that the dissemination of a publication presents a clear danger to the loyalty, discipline, or morale of troops at his installation, the installation commander

may, without prior approval of higher headquarters, delay the distribution of any publication which he considers undesirable, on property subject to his control. The commander will consider whether the act of restriction will in itself result in the publication in question achieving notoriety and increased circulation to military personnel through off-post sources.

d. Reports. Concurrently with imposing a delay as authorized in *c* above, the installation commander will so inform the next major commander and Headquarters, Department of the Army (Chief of Public Information, extension 74200), and request from Headquarters, Department of the Army, approval to prohibit the distribution of that publication or the particular issue thereof. Telephonic communication will be used in each instance. If the publication in question is one which is unlikely to be available at Headquarters, Department of the Army, a copy of the publication or a transcript of the text of the portion giving rise to the dissemination restriction will be forwarded to Headquarters, Department of the Army, by the fastest available means. The delay in distribution will remain in force until the decision to approve or disapprove the request is made. These reports are exempt under provisions of paragraph 7-2*a*, AR 335-15.

e. Distribution outlets. An installation commander may, in his discretion, impose a requirement that distribution of publications may not be made except through regularly established and approved distribution outlets, unless prior approval is obtained from the commander or his authorized representative. The installation commander may, without informing higher headquarters or Department of the Army in advance, take appropriate

action to prevent the distribution of publications by persons who have not obtained the required approval. Except where the publication in question is published primarily for advertising or promotional purposes, a denial of a request for permission to distribute a publication will be reported as required in *d* above.

APPENDIX D

September 12, 1969
NUMBER 1325.6
ASD(M&RA)

DEPARTMENT OF DEFENSE DIRECTIVE

SUBJECT Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces

References: (a) U. S. Constitution, First Amendment

(b) Title 50, U. S. Code Appendix, Section 462

(c) Title 18, U. S. Code, Sections 1381, 2387, 2385, 2388

(d) Title 10, U. S. Code, Chapter 47 (Uniform Code of Military Justice)

(e) DoD Directive 1334.1, "Wearing of the Uniform," August 11, 1969

I. *PURPOSE AND APPLICABILITY*

This Directive provides general guidance governing the handling of dissident activities by members on active duty of the Army, Navy, Air Force, and Marine Corps. Specific problems can, of course, be resolved only on the basis of the particular facts of the situation and in accordance with the provisions of applicable Department regulations and the Uniform Code of Military Justice.

II. *POLICY*

It is the mission of the Department of Defense to safeguard the security of the United States. The service member's right of expression should be preserved to the maximum extent possible, consistent with good order and discipline and the national security. On the other hand, no Commander should be indifferent to conduct which, if allowed to proceed unchecked, would destroy the effectiveness of his unit. The proper balancing of these interests will depend largely upon the calm and prudent judgment of the responsible Commander.

III. *SPECIFIC GUIDELINES*

The following guidelines relate to principal activities in this area which the Armed Forces have encountered:

A. *Possession and Distribution of Printed Materials*

1. A Commander is not authorized to prohibit the distribution of a specific issue of a publication distributed through official outlets such as post exchanges and military libraries. In the case of distribution of publications through other than official outlets, a Commander may require that prior approval be obtained for any distribution on a military installation in order that he may determine whether there is a clear danger to the loyalty, discipline, or morale of military personnel, or if the distribution of the publication would materially in-

terfere with the accomplishment of a military mission. When he makes such a determination, the distribution will be prohibited.

2. While the mere possession of unauthorized printed material may not be prohibited, printed material which is prohibited from distribution shall be impounded if the Commander determines that an attempt will be made to distribute.

3. The fact that a publication is critical of Government policies or officials is not, in itself, a ground upon which distribution may be prohibited.

B. *Off-Post Gathering Places.* Commanders have the authority to place establishments "off-limits," in accordance with established procedures, when, for example, the activities taking place there, including counselling members to refuse to perform duty or to desert, involve acts with a significant adverse effect on members' health, morale, or welfare.

C. *Servicemen's Organizations.* Commanders are not authorized to recognize or to bargain with a so-called "servicemen's union."

D. *Publication of "Underground Newspapers."* Personal writing for publication may not be pursued during duty hours, or accomplished by the use of Government or non-appropriated fund property. While publication of "underground newspapers" by military personnel off-

post, on their own time and with their own money and equipment, is not prohibited, if such a publication contains language the utterance of which is punishable under Federal law, those involved in the printing, publication, or distribution may be disciplined for such infractions.

E. *On-Post Demonstrations and Similar Activities.* The Commander of a military installation shall prohibit any demonstration or activity on the installation which could result in interference with or prevention of orderly accomplishment of the mission of the installation, or present a clear danger to loyalty, discipline, or morale of the troops. It is a crime for any person to enter a military reservation for any purpose prohibited by law or lawful regulations, or for any person to enter or re-enter an installation after having been barred by order of the Commander (18 U.S.C. 1382).

F. *Off-Post Demonstrations by Members.* Members of the Armed Forces are prohibited from participating in off-post demonstrations when they are on duty, or in a foreign country, or when their activities constitute a breach of law and order, or when violence is likely to result, or when they are in uniform in violation of DoD Directive 1334.1 (reference (e)).

G. *Grievances.* The right of members to complain and request redress of grievances against actions of their commanders is protected by Article 138 of the Uniform Code of Military Justice. In ad-

dition, a member may petition or present any grievance to any member of Congress (10 U.S.C. 1034). An open door policy for complaints is a basic principle of good leadership, and Commanders should personally assure themselves that adequate procedures exist for identifying valid complaints and taking corrective action.

IV. *EFFECTIVE DATE AND IMPLEMENTATION*

This Directive is effective immediately. Two (2) copies of implementing regulations shall be forwarded to the Assistant Secretary of Defense (Manpower and Reserve Affairs) within ninety (90) days.

Melvin A. Laird
Secretary of Defense

Enclosure — 1

Constitutional and Statutory Provisions

APPENDIX E

DEPARTMENT OF THE ARMY
OFFICE OF THE ADJUTANT GENERAL
Washington, D.C. 20310

28 May 1969

AGAM-P (M) (27 May 69) DCSPER-SARD
SUBJECT: Guidance on Dissent

SEE DISTRIBUTION

1. In the past few weeks there have been press reports suggesting a growth in dissent among military personnel. Questions have been raised concerning the proper treatment of manifestations of soldier dissent when they occur. The purpose of this letter is to provide general guidance on this matter. Specific dissent problems can, of course, be resolved only on the basis of the particular facts of the situation and in accordance with provisions of applicable Army regulations.

2. It is important to recognize that the question of "soldier dissent" is linked with the Constitutional right of free speech and that the Army's reaction to such dissent will—quite properly—continue to receive much attention in the news media. Any action taken at any level may therefore reflect—either favorably or adversely—on the image and standing of the Army with the American public. Many cases involve difficult legal questions, requiring careful development of the factual situation and application of various constitutional, statutory, and regulatory provisions (See Appendix A). Consequently, commanders should consult with their Staff Judge Advocates and may in appropriate cases confer with higher

authority before initiating any disciplinary or administrative action in response to manifestations of dissent. The maintenance of good order and discipline and the performance of military missions remains, of course, the responsibility of commanders.

3. "Dissent," in the literal sense of disagreement with policies of the Government, is a right of every citizen. In our system of Government, we do not ask that every citizen or every soldier agree with every policy of the Government. Indeed, the First Amendment to the Constitution requires that one be permitted to believe what he will. Nevertheless, the Government and our citizens are entitled to expect that, regardless of disagreement, every citizen and every soldier will obey the law of the land.

4. The right to express opinions on matters of public and personal concern is secured to soldier and civilian alike by the Constitution and laws of the United States. This right, however, is not absolute for either soldier or civilian. Other functions and interests of the Government and the public, *which are also sanctioned and protected by the Constitution, and are also important to a free, democratic and lawful society*, may require reasonable limitations on the exercise of the right of expression in certain circumstances. In particular, the interest of the Government and the public in the maintenance of an effective and disciplined Army for the purpose of National defense justifies certain restraints upon the activities of military personnel which need not be imposed on similar activities by civilians.

5. The following general guidelines are provided to cover

some of the manifestations of dissent which the Army has encountered.

a. *Possession and distribution of political materials.*

(1) In the case of publications distributed through official outlets such as Post Exchanges and Post Libraries, a commander is authorized to delay distribution of a specific issue of a publication in accordance with the provisions of para. 5-5 of AR 210-10. Concurrently with the delay, a commander must submit a report to the Department of the Army, ATTN: CINFO. A commander may delay distribution only if he determines that the specific publication presents a clear danger to the loyalty, discipline, or morale of his troops.

(2) In the case of distribution of publications through other than official outlets, a commander may require that prior approval be obtained for any distribution on post. Distribution without prior approval may be prohibited. A commander's denial of authority to distribute a publication on post is subject to the procedures of para. 5-5, AR 210-10, discussed above.

(3) A commander may not prevent distribution of a publication simply because he does not like its contents. All denials of permission for distribution must be in accordance with the provisions of para. 5-5, AR 210-10. For example, a commander may prohibit distribution of publications which are obscene or otherwise unlawful (e.g., counselling disloyalty, mutiny, or refusal of duty). A commander may also prohibit distribution if the manner of accomplishing the distribution materially interferes with the accomplishment of a military mission (e.g., interference with training or troop formation). In any

event, a commander must have cogent reasons, with supporting evidence, for any denial of distribution privileges. The fact that a publication is critical—even unfairly critical—of government policies or officials is not in itself, a grounds for denial.

(4) Mere possession of a publication may not be prohibited; however, possession of an unauthorized publication coupled with an attempt to distribute in violation of post regulations may constitute an offense. Accordingly, cases involving the possession of several copies of an unauthorized publication or other circumstances indicating an intent to distribute should be investigated.

b. *Coffee Houses.*

The Army should not use its off-limits power to restrict soldiers in the exercise of their Constitutional rights of freedom of speech and freedom of association by barring attendance at coffee houses, unless it can be shown, for example, that activities taking place in the coffee houses include counselling soldiers to refuse to perform duty or to desert, or otherwise involve illegal acts with a significant adverse effect on soldier health, morale or welfare. In such circumstances, commanders have the authority to place such establishments "off limits" in accordance with the standards and procedures of AR 15-3. As indicated, such action should be taken only on the basis of cogent reasons, supported by evidence.

c. *"Servicemen's Union."*

Commanders are not authorized to recognize or to bargain with a "servicemen's union." In view of the constitutional right to freedom of association, it is unlikely

that mere membership in a "servicemen's union" can constitutionally be prohibited, and current regulations do not prohibit such membership. However, specific actions by individual members of a "servicemen's union" which in themselves constitute offenses under the Uniform Code of Military Justice or Army regulations may be dealt with appropriately. Collective or individual refusals to obey orders are one example of conduct which may constitute an offense under the Uniform Code.

d. *Publiciation of "Underground Newspapers."*

Army regulations provide that personal literary efforts may not be pursued during duty hours or accomplished by the use of Army property. However, the publication of "underground newspapers" by soldiers off-post, on their own time, and with their own money and equipment is generally protected under the First Amendment's guarantees of freedom of speech and freedom of the press. Unless such a newspaper contains language, the utterance of which is punishable under Federal law (e.g., 10 U.S.C. Sec. 2387 or the Uniform Code of Military Justice), authors of an "underground newspaper" may not be disciplined for mere publication. Distribution of such newspapers on post is governed by para. 5-5, AR 210-10, discussed in para. 5a above.

e. *On-Post Demonstrations by Civilians.*

A commander may legally bar individuals from entry on a military reservation for any purpose prohibited by law or lawful regulation, and it is a crime for any person who has been removed and barred from a post by order of the commander to re-enter. However, a specific

request for a permit to conduct an on-post demonstration in an area to which the public has generally been granted access should not be denied on an arbitrary basis. Such a permit may be denied on a reasonable basis such as a showing that the demonstration may result in a clear interference with or prevention of orderly accomplishment of the mission of the post, or present a clear danger to loyalty, discipline, and morale of the troops.

f. *On-Post Demonstrations by Soldiers.*

AR 600-20 and 600-21 prohibit all on-post demonstrations by members of the Army. The validity of these provisions is currently being litigated. Commanders will be advised of the results of this litigation.

g. *Off-Post Demonstrations by Soldiers.*

AR 600-20 and 600-21 prohibit members of the Army from participating in off-post demonstrations when they are in uniform, or on duty, or in a foreign country, or when their activities constitute a breach of law and order, or when violence is likely to result.

h. *Grievances.*

The right of members to complain and request redress of grievances against actions of their superiors is protected by the Inspector General system (AR 20-1) and Article 138, UCMJ. In addition, a soldier may petition or present any grievance to any member of Congress (10 U.S.C. Sec. 1034). An open door policy for complaints is a basic principle of good leadership, and commanders should personally assure themselves that adequate procedures exist for identifying valid complaints

and taking corrective action. Complaining personnel must not be treated as "enemies of the system." Even when complaints are unfounded, the fact that one was made may signal a misunderstanding, or a lack of communication, which should be corrected. In any system as large as the Army, it is inevitable that situations will occur giving rise to valid complaints, and over the years such complaints have helped to make the Army stronger while assuring compliance with proper policies and procedures.

6. It is the policy of the Department of the Army to safeguard the service member's right of expression to the maximum extent possible, and to impose only such minimum restraints as are necessary to enable the Army to perform its mission, in the interest of National defense. The statutes and regulations referred to above (as well as some other provisions of law and regulations) are concerned with these permissible restraints and authorize a commander to impose restrictions on the military member's right of expression and dissent, under certain circumstances. However, in applying any such statutes and regulations in particular situations, it is important to remember that freedom of expression is a fundamental right secured by the Constitution. Furthermore, it is important to remember that the Commander's responsibility is for the good order, loyalty and discipline of all his men. Severe disciplinary action in response to a relatively insignificant manifestation of dissent can have a counter productive effect on other members of the Command, because the reaction appears out of proportion to the threat which the dissent represents. Thus, rather than serving as a deterrent, such disproportionate actions may

stimulate further breaches of discipline. On the other hand, no Commander should be indifferent to conduct which, if allowed to proceed unchecked, would destroy the effectiveness of his unit. In the final analysis no regulations or guidelines are an adequate substitute for the calm and prudent judgment of the responsible commander.

7. The mission of the Army is to execute faithfully, as ordered, policies and programs established in accordance with law by duly elected and appointed Government officials. Unquestionably, the vast majority of service members are prepared to do what is required of them to perform that mission, whether or not they agree in every instance with the policies the mission reflects.

BY ORDER OF THE SECRETARY OF THE ARMY:

KENNETH G. WICKHAM
Major General, USA
The Adjutant General

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No. 71-1271

In the Supreme Court of the United States

OCTOBER TERM, 1971

DON SCHNEIDER, SP-4, UNITED STATES ARMY,
PETITIONER

v.

MELVIN R. LAIRD, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 453 F. 2d 345. The opinion of the district court (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1972. The petition for a writ of certiorari was filed on April 5, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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QUESTIONS PRESENTED

1. Whether an order of the base commander at the Army's chemical and biological warfare testing base, Dugway Proving Ground, Utah, delaying on-base distribution of a publication ridiculing the command structure at the base on the ground that dissemination of the publication presented "a clear danger to military loyalty, discipline or morale," and Army Headquarter's subsequent order prohibiting on-base distribution of the ~~issue~~ publication were constitutionally impermissible under the First Amendment.

2. Whether the fact that the commander acted without first according petitioner, the publisher, an opportunity for an administrative hearing was a denial of due process under the Fifth Amendment.

CONSTITUTIONAL PROVISIONS AND REGULATION INVOLVED

The First Amendment to the Constitution of the United States provides in relevant part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

Army Regulation 210–10, ¶5–5 is set forth at Pet. App. C.

STATEMENT

1. Petitioner, an Army enlisted man assigned to the Army's chemical and biological warfare testing base, Dugway Proving Ground, Utah, was at the time in question the editor and publisher of an "underground newspaper," *The Daisy*, which is distributed off-base at various establishments (Complaint, Exhibit D, p. 16).[1] In the Spring of 1970, he applied to the base commander for permission to distribute issues 1 and 2 of *The Daisy* on the base. Acting under Army regulation 210–10, ¶5–5(c) (Pet. App. C), the commander ordered that on-base distribution of these issues be delayed pending a decision by Army Headquarters on the distribution question. (See AR 210–10, ¶5–5(d); Pet. App. C.)

While the matter was still before the Department of the Army, petitioner, in September 1970, commenced the present civil suit in the United States District Court for the District of Utah, seeking a judicial declaration that he be permitted to distribute all issues of *The Daisy* on the base. Shortly thereafter, Army Headquarters ruled that the on-base dissemination of the newspaper's first two issues should be permitted (Pet. App. B–5).

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[1] Petitioner has since completed his military obligation. But since other enlisted men are now preparing subsequent issues of the underground newspaper, and presumably stand ready to distribute the issue that is involved here in the event that the decision below should be reversed, the questions raised in the petition do not appear to be moot. Cf. *Dash* v. *Commanding General*, 307 F. Supp. 849 (D.S.C.), affirmed, 429 F. 2d 427 (C.A. 4), certiorari denied, 401 U.S. 981.

On October 16, 1970, petitioner submitted a request to distribute issue 4 of *The Daisy* on base (Pet. 7). Again the base commander delayed such distribution pending a final decision by Army Headquarters, as provided in AR 210-10 (Pet. 8); on December 11, 1970, the Department of the Army prohibited the on-base distribution of the fourth issue (Pet. 8).

2. Petitioner amended his complaint in the district court to add a prayer for declaratory and injunctive relief with respect to the on-base distribution of the fourth issue of *The Daisy*. Following an evidentiary hearing, the district court held (Pet. App. B-3): "Army Regulation 210-10 * * *, considered separately or in connection with the subsequent directives mentioned, is not unreasonable, capricious or arbitrary, is not unreasonably vague or indefinite, is not unconstitutional on its face or otherwise, and constitutes a reasonable and appropriate regulation within the jurisdiction and authority of the Department of the Army." The court then examined issue 4 of *The Daisy* and concluded (Pet. App. B-4 to B-5) that "it seems intended and designed primarily to hold the Army and its mission up to ridicule, derision or disgust, to set enlisted men against officers, military personnel against civilians, and to provoke general discord and disharmony." It held (Pet. App. B-5) that "neither in law nor reason can such a publication be entitled to distribution on a military post in the face of the reasonable findings and order of that command * * *." On appeal, the court of appeals affirmed *per curiam* (Pet. App. A).

ARGUMENT

I. Petitioner contends here, as he did below, that the Army's restriction, pursuant to AR 210–10, ¶5–5, on the on-base distribution of issue 4 of *The Daisy*[2] was an unwarranted infringement on the rights of free press and free speech, as guaranteed by the First Amendment.[3] We disagree.

Under Army regulation 210–10, ¶5–5(c), a base commander is authorized to delay the on-base distribution of a publication which "he considers undesirable," if it appears that such distribution would present "a clear danger to the loyalty, discipline or morale" of the servicemen under his command.[4] Here,

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[2] No restriction was placed on publication of *The Daisy*; nor did the Army interfere in any way with the distribution of the newspaper off the base (See Pet. App. E–4 to E–5).

[3] It appears that petitioner has abandoned in this Court the contention that Army regulation 210–10 is unconstitutional on its face. At all events, the constitutionality of the regulation was correctly upheld by both courts below (see Pet. Apps. A and B). The regulation has, moreover, been consistently upheld in the face of similar constitutional attacks by other courts of appeals considering the question. See *Noland* v. *Iola*, C.A. 6, No. 71–1661, decided April 21, 1972; *United States* v. *Flower*, 452 F.2d 80 (C.A. 5); *Dash* v. *Commanding General*, *supra*; *Yohe* v. *Resor*, 431 F.2d 690 (C.A. 4), certiorari denied, 401 U.S. 982. And cf. *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886; *Weissman* v. *United States*, 387 F.2d 271, 274 (C.A. 10).

[4] As the district court pointed out (Pet. App. B–3), the standards to be applied under the regulation are set forth in some detail in Department of Defense Directive 1325.6 (September 12, 1969), reproduced at Pet. App. D. and in the Judge Advocate General's Memorandum, "Guidance on Dissent," reproduced at Pet. App. E. Distribution is to be the rule, not the exception, and the base commander is not to delay distribution "simply because he does not like [the] contents" of a pub-

the commander testified that issue 4 of *The Daisy* appeared to be designed to drive a wedge between the civilian and military communities at Dugway, and that this would in his judgment interfere with the carrying out of the installation's assignment (Tr. 19).[5] He pointed out (*ibid.*) that, because of the highly sensitive nature of the chemical and biological defense testing done at the base, "[i]t takes the utmost in cooperation on the part of all members of that testing team * * * [and] a great deal of respect, man for man, to make this program work." And, as the court below observed (Pet. App. A–4), in explaining how the publication undermined the program, the commander "included specific references to passages of ridicule amplified by explanations of the perceived detrimental effect on the troop discipline, loyalty, and morale."[6]

The district court, after hearing the commander's testimony and "carefully examin[ing] the contents of issue number 4 of The Daisy * * *" (Pet. App. B–4), found as a fact that the publication "seems intended

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lication (Pet. App. E–3), or because the publication is unfairly critical "of government policies or officials" (Pet. App. E–4). In each instance, "a commander must have cogent reasons, with supporting evidence, for any denial of distribution privileges" (*Ibid.*).

[5] "Tr." references are to the transcript of proceedings in the district court.

[6] For example, issue 4 of *The Daisy* includes a cartoon showing an enlisted man "accidentally" shooting an officer, as well as a short item describing a company executing its commanding officer (Complaint, Exhibit D, pp. 3, 4). In generally ridiculing military officers, the articles refer to the Dugway staff as, among other terms, "the Hitlers of H.H.C." and the "Mini Pig" (*id.*, pp. 11, 16).

and designed primarily to hold the Army and its mission up to ridicule, derision or disgust, to set enlisted men against officers, military personnel against civilians, and to provoke general discord and disharmony" (Pet. App. B–4 to B–5). The court of appeals agreed that this finding was "supported by the record" (Pet. App. A–4).

It is, of course, well recognized that "[i]n reviewing military decisions, [civilian courts] must accommodate the demands of individual rights and the social order in a context which is far removed from" those encountered in civilian litigation. *Noyd* v. *Bond*, 395 U.S. 683, 694; *Dash* v. *Commanding General*, *supra*. The "overriding demands of discipline and duty * * *" (*Burns* v. *Wilson*, 346 U.S. 137, 140) within the military warrant in proper circumstances some limitation upon a soldier's freedom of expression which might not otherwise be considered acceptable in civilian life. See, *e.g.*, *Cortright* v. *Resor*, 447 F. 2d 245, 252 (C.A. 2), certiorari denied, 405 U.S. 965; *O'Mara* v. *Zebrowski*, 447 F. 2d 1085, 1089 (C.A. 3); *Callison* v. *United States*, 413 F. 2d 133, 135–136 (C.A. 9); *Raderman* v. *Kaine*, 411 F. 2d 1102, 1104 (C.A. 2); and see *Dash* v. *Commanding General*, *supra*, 307 F. Supp. at 852.

This is just such a situation. The publication in question has been found by both courts below to be such as to have a serious detrimental effect on the performance and morale of servicemen stationed at the base. The limited restriction imposed by the Army on its distribution on base—without, however, restricting publication of the paper or the distribution of

issue 4 off the base—was thus constitutionally permissible under the First Amendment. As the district court observed (Pet. App. B–5):

> To allow this [on-base distribution], in principle, would compromise the constitutional right of the executive to reasonably provide for the common defense, would permit all manner of similar interferences with the legitimate mission of military establishments and by such abuse under the guise of freedom of speech might tend to erode or to throw into question this vital right in its far-reaching appropriate applications. * * *

Nor are the decisions below in conflict with *Kiiskila* v. *Nichols*, 433 F. 2d 745 (C.A. 7), or *United States* v. *Bradley*, 418 F. 2d 688 (C.A. 4), as petitioner seems to suggest. Neither *Kiiskila* nor *Bradley* involved any restriction upon the right of servicemen to distribute literature on a military base. Indeed, the plaintiffs in those cases were civilians who were not "in any way subject to military discipline [itself]" (433 F. 2d at 750). For that very reason, the Fourth Circuit in *Bradley* explicitly declined to decide the constitutional questions raised here.

2. Petitioner also contends that the failure of the military to accord him a hearing before prohibiting the on-base distribution of issue 4 of *The Daisy* denied him due process of law under the Fifth Amendment.

But, as the Fourth Circuit pointed out in *Yahr* v. *Resor*, *supra*, 431 F. 2d at 691, "[w]ithin the military establishment, and under the regulations in question, the commanding officer has primary responsibility for

determining the impact of the newspaper on the men in his command." Due process does not require that he afford a hearing to the publisher of such material as is involved here before barring its dissemination on the base. Compare *United States* v. *Jelinski*, 411 F. 2d 476, 477 (C.A. 5); *O'Mara* v. *Zebrowski*, *supra*, 447 F. 2d at 1090; *Agrati* v. *Laird*, 440 F. 2d 683, 684 (C.A. 9).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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